

GUIDELINES FOR ASSESSING REASONABLENESS OF FIDUCIARIES' FEES

Introduction

Licensed fiduciaries have a range and degree of responsibility found in few other professions. Because the services fiduciaries provide must be tailored to the needs of the individuals they serve, a “cookie-cutter” regulatory approach to the fees fiduciaries may charge is not practical. Requiring the use of predetermined times to perform specific tasks would result in overcharges in less complicated cases and would place too large an economic burden on the fiduciary obligated to perform the task. While there is no case law discussing the latter, lessons from attorney discipline cases are analogous to the fiduciary practice. *See*: Arizona Ethics Opinion 01-06; Ariz. Op. 99-08.

Caselaw has adopted a case-by-case approach to the review of fiduciary’s fees. *In re Estate of Gordon*, 87 P.3d 89, 207 Ariz. 401 (Ariz.App.Div.1 03/30/2004). The statutes and applicable regulations require fees by fiduciaries must be reasonable and necessary. Ariz. Rev. Stat. Sec. 14-3719, 14-5314, 14-5414; and 14-10805; Standards 4i and 5a, Fiduciary Code of Conduct. *See also*: *In re Smith's Estate*, 131 Ariz. 190, 639 P.2d 380 (1981).

Case law has expanded the statutes to allow Courts to consider both the fiduciary’s and the estate’s circumstances in determining reasonableness and necessity.

The unique circumstances of the fiduciary and the beneficiaries of the estate managed by the fiduciary relationship places the burden of reasonableness on the fiduciary to be efficient, but thorough, in the amount of time spent on specific tasks and avoiding duplication of effort.

Therefore in order for courts, counsel, fiduciaries and other interested persons to have a common starting point from which to evaluate the reasonableness and necessity of the fiduciary fees, the following guidelines have been proposed.

These are guidelines in nature only. The Court, in its discretion, may assign more or less weight to any factor listed below:

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1. The fiduciary shall comply with the provisions of Rule 33, Uniform Rules of Probate Procedure in submitting a request for fee approval.
2. The time expended and rates charged by the fiduciary must be reasonable and necessary. In making this determination, the Court shall consider the following factors:
 - a. Experience, training and expertise of the person performing the task
 - b. Type of services being provided taking into consideration whether:
 - i. The fiduciary code of conduct requires that only a licensed fiduciary perform this service;
 - ii. A non-licensed staff member or outside contractor could perform the same level of service at a lesser rate (such as routine matters like paying bills);
 - iii. The service being provided is mandated by statute, fiduciary regulation, court order or other applicable regulation.;
 - iv. The service being provided is as the result of an emergency situation, was extraordinary or potentially dangerous in nature;
 - v. The service being provided was performed at times other than normal business hours;
 - vi. The fiduciary utilized special skills or licensing in performing this task;
 - vii. The time and/or physical labor required;
 - viii. The novelty and difficulty of the tasks involved;
 - ix. Whether the fiduciary's acceptance of the particular employment in this

matter precluded other employment by the fiduciary;

- x. The value, extent and type of the assets to be managed;
- xi. Any difficulties the fiduciary had in marshalling, inventorying or managing the assets;
- xii. The results obtained by the fiduciary;
- xiii. The benefits derived by the estate, trust, ward, protected person or beneficiaries;
- xiv. Any time limitations imposed by the circumstances, the Court or any parties;
- xv. Any financial limitations imposed by the circumstances, the Court or any parties which impeded the fiduciary's performance of his/her duties;
- xvi. Any other limitations imposed by the circumstances, the Court or any parties which impeded the fiduciary's performance of his/her duties;
- xvii. Whether the ward or protected person suffered any medical or psychological events during the accounting period which might have necessitated additional services;
- xviii. The nature and length of the professional relationship with the ward and/or protected person or the estate (typically there are more costs earlier in the case);
- xix. The degree of risk assumed by the fiduciary;
- xx. The same type and quality service could have been provided by a contractor at a lesser rate *and* such a contractor was available;

- xxi. Whether the service provided by the fiduciary was available in the community or had to be performed by the fiduciary (ie. transporting clients to appointments in rural areas);
 - xxii. Whether the service provided is generally considered part of the fiduciaries normal rate as an overhead charge (ie. clerical time to photocopy routine letter drafted by fiduciary is not compensable separately from fiduciary charge to draft letter);
 - xxiii. Whether the fiduciary was involved in litigation in the matter; who brought the litigation, the type of litigation, and the results of the litigation;
 - xxiv. Whether the rates charged by the fiduciary have been previously approved by the Court in other matters
- c. Rates charged within the community.
 - d. Any other fact the Court deems relevant.
- 3. The Court shall consider whether there are any other sources of payment available for the fiduciaries' fees and costs and shall enter such orders as are appropriate under the circumstances
 - 4. The reimbursement sought by the fiduciary for out of pocket costs or reimbursable expenses must be reasonable and necessary. In determining the reasonableness, the Court may consider if the rate for mileage, photocopies, and the like equals or is less than that charged or approved by governmental entities (ie. Mileage rate equal to that approved by the IRS; photocopy rate same or less than charged by the Court). If the rates are commensurate, there is a presumption of reasonableness

5. The payment by the fiduciary for filing fees, bonds, certified copies of letters of appointment or administration, birth certificates, death certificates, copies of military records and the like shall be presumed reasonable and necessary.
6. The payment by the fiduciary for any court-ordered goods or services shall be presumed reasonable and necessary with the exception of attorneys fees which shall be subject to Rule 33 and other guidelines.
7. The fiduciary shall not “mark-up” payments for costs as postage, filing fees, certified copies, and bonds, or payments to outside contractors.
8. The fiduciary shall not charge interest for unpaid bills or reimbursement of costs unless prior approval from the Court has been obtained.
9. The fiduciary shall not charge the estate for the fiduciary and staff’s time to defend an AOC complaint or complaint to any other regulatory agency under which the fiduciary holds a professional license. This prohibition shall *not* apply to complaints or objections filed in Court against the fiduciary. The Court shall review the fees and costs charged by a fiduciary in defense of a complaint or objection filed in Court using the same guidelines above as for fees and costs of other work performed by the fiduciary. Nothing in this section shall prevent a fiduciary from offering evidence in a fiduciary fee dispute regarding the fiduciary’s defense of an AOC or other regulatory agency complaint if such evidence is allowable under the Arizona Rules of Evidence.
12. The Court, for good cause shown, may deviate from these guidelines. No such deviation shall occur without prior notice to the fiduciary and all other interested persons and giving them an opportunity to present evidence and be heard.